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Supreme Court of the United States

OCTOBER TERM—1951

No. 303

JOHN DONALD WALKER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETER L. F. SABBATINO,
Attorney for Petitioner.

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Supreme Court of the United States

OCTOBER TERM—1951

No. ———

JOHN DONALD WALKER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR ISSUANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, John Donald Walker, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated July 10, 1951, affirming, by a divided court, the judgment of conviction rendered herein against the petitioner on May 31, 1950, by the United States District Court for the Southern District of New York. The petitioner thereafter duly filed a petition for rehearing which was denied on August 6, 1951. This petition is filed within thirty days from such date.

Jurisdiction

The original jurisdiction of the United States District Court in this case is based upon the Statute referred to

in the indictment, viz., U. S. Code, Title 18, Section 415 (1946 ed.), commonly referred to as the National Stolen Property Act.* The jurisdiction of this Court to issue a writ of certiorari to review the judgment of affirmance rendered by the Court of Appeals is invoked under U. S. Code Title 28, Section 1254 and Rule 38 of the Rules of this Court.

Opinions Below

The majority opinion of Judge Harrie B. Chase, concurred in by Chief Judge Thomas W. Swan, and the dissenting opinion of Judge Jerome N. Frank, have not been officially reported, but are attached as an appendix to this record. Previous to the judgment of conviction herein, the petitioner had been tried and convicted in the same United States District Court on the same two counts of the indictment. That judgment of conviction was reversed by the Court of Appeals for the Second Circuit and a new trial ordered (176 F. 2d 564; certiorari denied, 338 U. S. 8, 70 S. Ct. 239).

Statement of Matters Involved

The judgment of the Court of Appeals sought to be reviewed affirmed a judgment of the United States District Court, which convicted the petitioner of violating Section 415 (1946 ed.) of Title 18, U. S. Code, commonly known as the National Stolen Property Act, after trial in the United States District Court for the Southern District of New York. The petitioner was tried before a jury and was found guilty on both counts of the indictment. This judgment was affirmed on appeal to the Court of Appeals and petitioner now seeks a review in this Court.

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* Now 18 U. S. C. (1948 rev.) 2314, with slight changes in phraseology.

The indictment on which petitioner was convicted alleges, in substance, that the petitioner unlawfully, wilfully, and knowingly transported in interstate commerce, from Houston, Texas, to New York City, on or about February 17, 1947, the *sum* of approximately $26,000 (First Count), and, on or about June 1, 1947, the *sum* of approximately $23,500 (Second Count), which said sums the petitioner is charged with having theretofore taken feloniously, by fraud, and with intent to steal and purloin.

The petitioner married Mary Ashe—whose property he was accused of stealing and transporting from Texas to New York—on January 25, 1947. She testified that, on the day of their marriage, petitioner informed her that his former wife had tied up his entire estate by legal action (745)* and, later, that he had to forward money to Chicago to establish a trust fund for the education of his son (741, 753), for which purpose he asked her to mortgage her warehouse in Houston, Texas (755-6). She further testified that, after she mortgaged her warehouse, she received $27,500, which she turned over to the petitioner. She testified further that petitioner represented to her that he sent the proceeds of the mortgage loan check to his attorney, Morris Meyers in Chicago to release funds tied up in litigation instituted by his former wife (774-5).

On the day after the mortgage loan funds were received, the petitioner and Mrs. Ashe continued their honeymoon, visiting St. Louis, New York (775-7), Boston (where they visited petitioner's son) (784-6), Detroit (where they met attorney Meyers, 787), and then returning to her home in San Antonio, Texas (789).

Later, in their travels, and while in Baltimore, Maryland, petitioner is alleged to have said to Mrs. Ashe

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* Numerals in parentheses refer to folios in the printed record.

that he was in income-tax difficulties and that he needed additional money to forward to his attorney, Meyers (820-2). She gave that as a reason for selling on May 28, 1947, the warehouse which she had previously mortgaged (823-4). After the warehouse sale, and the receipt by the petitioner of all but $3,500 realized therefrom (1035-6), they both continued their travels, visiting Baltimore and Detroit where they again saw petitioner's attorney (1044-7). They spent time and money at various race-tracks, including the one at Monmouth, New Jersey (1063).

It was the petitioner's contention that Mary Ashe mortgaged, and later sold, her property for their joint pleasure and for honeymoon expenses (1595).

Petitioner paid all expenses during their extensive travels and furnished Mrs. Ashe with whatever cash she requested (982-3, 1001-2, 1087-8, Exhs. E to M).

Petitioner spent practically all the warehouse proceeds on both himself and Mrs. Ashe; and he remained with her until arrested, although he had then practically no money left.

The matters involved herein are important questions in the administration of federal criminal justice. The record discloses conduct by the Court and the prosecutor which deprived the petitioner of a fair trial. The prosecutor was guilty of intemperate, vituperative language and engaged in name-calling of the petitioner. He urged arguments in summation based upon a letter of Mrs. Ashe, *not* in evidence,—arguments shown by the record to have influenced the jury in its deliberations. He poisoned the minds of the jurors by unfair arguments and deprived the petitioner of a fair consideration of the evidence by the jury. The trial court abused its discretion in curtailing the summation of petitioner's counsel on a vital issue of fact concerning an alleged admission of guilt by the

petitioner, an admission not testified to on the first trial; furthermore, the trial court improperly decided, favorably to the government, an issue of fact, bearing on that alleged admission of guilt, although the trial record clearly showed that the Court was in error, which error the Court refused to permit defense counsel to point out, and thereby placed petitioner and his counsel in a prejudicial light before the jury. The trial court refused to suppress, on timely motion, material evidence obtained through an illegal search of petitioner's luggage. The Court refused to examine itself, or to direct the government to produce, an investigation report concerning the seizure admittedly prepared by the federal agent who conducted the search. There was a failure of proof that the petitioner transported money of the value of $5,000 or more, as required by the statute, under *either* count of the indictment, or that the property transported was stolen.

Questions Presented

1. Did the Court of Appeals err in affirming the judgment of conviction and in holding as harmless error the prosecutor's prejudicial, abusive and intemperate language, in summation, in which he engaged in repeated bitter name-calling, in which he expressed his personal belief that the petitioner was guilty, and in which he advanced arguments based upon a letter not in evidence —arguments shown to have influenced the jury in its deliberations?

2. Did the Court of Appeals err in affirming the judgment of conviction where the trial court abused its discretion in curtailing defense summation on a vital issue of fact, concerning an alleged admission of guilt by the petitioner, and in improperly deciding favorably to the government an issue of fact bearing on that point, although the record clearly showed that the Court was in error, which error the Court refused to permit defense

counsel to point out, thereby placing petitioner and his counsel in an unfavorable light before the jury?

3. Did the Court of Appeals err in affirming the judgment of conviction (a) where the trial court denied a motion to suppress where the search and seizure, without a warrant, leading to the obtaining and use at the trial of information derived therefrom, were allegedly made on an ambiguous consent obtained from the prisoner after his arraignment and while incarcerated? (b) and did the Court of Appeals err in sustaining the legality of the seizure on the ground that the petitioner "had no right to object to the search of premises not occupied by him nor to the seizure of property not within his possession"?

4. Did the Court of Appeals err in affirming the judgment of conviction where the trial court refused to direct the production by the government of a report on the search and seizure, which had been prepared by the agent then under cross examination, and where the court itself, when asked by the defense, refused to examine it?

5. Did the Court of Appeals err in affirming the judgment of conviction (a) where there was a failure of proof that what was transported was stolen property; and (b) where there was a failure of proof that petitioner transported "money" of the value of $5,000 or more, under either count of the indictment?

Reasons for Issuance of Writ of Certiorari

1. The Court of Appeals for the Second Circuit in affirming the judgment of conviction has disregarded substantial prejudicial errors which deprived the petitioner of a fair trial. The conduct, herein shown, of the trial court and of the prosecutor, involves an important question in the administration of federal criminal justice.

2. Judge Frank, in his dissenting opinion, in the case at bar, held that the errors herein complained of are substantial and prejudicial and voted to reverse. He wrote, in part, "from time to time the Supreme Court has struck a balance different from ours and has held errors prejudicial which we had called 'harmless' ", and cited in support thereof the following cases: *Berger* v. *U. S.*, 295 U. S. 78; *Bruno* v. *U. S.*, 308 U. S. 287; *Bollenback* v. *U. S.*, 326 U. S. 607; *Bihn* v. *U. S.*, 328 U. S. 633; *Kotteakos* v. *U. S.*, 328 U. S. 750; *Krulewitch* v. *U. S.*, 336 U. S. 440.

3. The case involves the construction of the IV Amendment to the federal constitution, and the decision herein on the legality of the search is in conflict with *Jeffers* v. *U. S.*, 187 Fed. 2nd 498, Court of Appeals, District of Columbia Circuit; certiorari granted, 71 S. Ct. 570.

4. The holding of the Court of Appeals of the Second Circuit in the case at bar, in disregarding as harmless error the refusal of the trial court itself to inspect or to order the production of the F. B. I. report on the seizure, is in conflict with its own prior decisions (*U. S.* v. *Andolschek,* 142 F. (2d) 503, 506; *U. S.* v. *Krulewitch,* 145 Fed. (2d) 76, 78-9; *U. S.* v. *Beekman,* 155 Fed. (2d) 580, 584; *U. S.* v. *Grayson,* 166 F. (2d) 863, 870) as well as with its own latest decision in *U. S.* v. *Coplon,* 185 F. (2d) 629, 638.

5. The indictment charged the transportation of a sum of stolen money. The proof showed the alleged larceny of checks in Texas. The government obtained a conviction by showing that the alleged stolen checks were (a) converted by the defendant in Texas into money and *other* checks, and in turn those checks were used by the defendant in Texas (b) to buy traveler's checks. It is of importance for the Supreme Court to decide whether the government can follow the conversion of the alleged stolen

checks into other checks legally obtained, and then into traveler's checks also legally obtained, when the statute is *silent* about following the transportation of things into which the stolen property has been converted. We find no case sanctioning such an interpretation of the statute, but, on the contrary, find the interpretation given to the facts by the trial court and the Court of Appeals repugnant to fundamental principles enunciated by this Court (*U. S.* v. *Resnick,* 299 U. S. 207, 209).

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination on a date certain to be therein named the full and complete transcript of the proceedings of said Court herein, entitled *United States of America* v. *John Donald Walker,* Docket No. 21, 978, and that the judgment of said Court be reviewed by this Court and for such other relief as to this Court may seem proper.

PETER L. F. SABBATINO,
233 Broadway,
New York 7, N. Y.

Dated this 4th day of September, 1951.

Supreme Court of the United States

OCTOBER TERM—1951

No. ———

JOHN DONALD WALKER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Indictment

The petitioner was found guilty of both counts of the indictment.

The first count reads as follows verbatim:

> "On or about the 17th day of February, 1947, at the Southern District of New York, John Donald Walker, the defendant, did unlawfully, wilfully and knowingly transport and cause to be transported in interstate commerce from Houston, Texas, to New York, N. Y., the sum of approximately $26,000, which sum the defendant had theretofore taken feloniously by fraud and with intent to steal and purloin."

The second count is in identical language and alleges that approximately "*the sum*" of $23,500 was transported on or about June 1, 1947.

Statute Involved

Section 415 of Title 18 (now Section 2314 of the U. S. C.), which defines the crime charged against the petitioner herein, reads, in part as follows:

> "Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000, or more, theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted or taken * * * shall be punished by a fine of not more than $10,000, or by imprisonment for not more than ten years, or both. * * *"

Statement of Proceedings

The defendant was first tried on the indictment in December, 1948, was convicted on both counts and sentenced by Leibell, J., to serve ten years on each count, to run *concurrently* and imposed *no fine* (8). On appeal, it was reversed and a new trial ordered (176 F. 2d 564). The case was retried in March and April, 1950, and the defendant was again convicted on both counts. Sugarman, J., sentenced the defendant to serve ten years on the first count and five years on the second count, to run *consecutively*. In addition, he imposed *a fine of $10,000 on each count* (1840).*

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* At the first trial, the jury reached its verdict after only one hour and thirteen minutes. At the second trial, a verdict was not reached until nineteen hours after the case was submitted to it and after it twice returned to the Court for additional instructions (1781, 1795). He has been continuously incarcerated since his arraignment on November 12, 1948 (5).

Résumé of the Facts

Mary Ashe, whose property defendant was accused of stealing and transporting from Texas to New York, was the principal witness for the government.

She was forced to admit at this trial on cross examination, as we shall point out, facts which she had not revealed at the first trial and which impeached her credibility.

She testified at both trials that she made defendant's acquaintance on a train while returning home to San Antonio, Texas (701; First Trial, 45-7); and that, at such meeting, defendant represented himself to be "a big stockholder in the C & O Road" (703) and that "he was pretty busy, very busy handling the estate of his mother and aunt" (710-11).

This "train" testimony at the first trial, repeated at the second trial, was demonstrated to be false by the discovery and introduction into evidence by the defense at the *second trial* of a statement which Mary Ashe, after careful examination, had signed, at the request of two government agents, on August 29th—the very day of defendant's arrest (1313, 14). This signed statement impeached Mary Ashe's testimony on direct examination—that she first met defendant on a train and that, at such meeting, he represented himself to be a man of substance and wealth. In the foregoing pretrial signed statement, Mary Ashe had informed the government agents that she had first made defendant's acquaintance, not on a train, but at the Mayflower Hotel, in Washington, D. C. (Court's Exh. 2, 1974).

The defendant married Mary Ashe on January 25, 1947 —about two months after he had met her. She testified that, on the day before the wedding, defendant informed her that he was required to notify the court of his remarriage (740-1).

Mary Ashe further testified that, on the day of their marriage, defendant advised her that his lawyer had informed him that his former wife had tied up his entire estate by legal action (745). Later, he informed her, she said, that he had to forward money to Chicago to establish a trust fund for the education of his son (753), and for this he asked her to mortgage her warehouse in Houston, Texas (755-6). It is incredible, however, that such representation was in fact made for Mary Ashe later met defendant's son, a Harvard student, on two occasions in Boston (786, 803-4). Furthermore, this son visited the Walkers at their home in San Antonio, Texas (840). Defendant certainly would not have arranged these three meetings between Mary Ashe and his son, if he had made the representation charged to him by her, for, at such meetings, defendant would have exposed himself to discovery. The fair inference that may be drawn is that defendant never did represent to Mary Ashe that he was required to set aside a trust fund for his son's education.

That that oral trial testimony of Mary Ashe as to defendant's representations to secure her property is of questionable veracity is borne out by the fact that she made no such accusations in her written statement given on the very day of defendant's arrest. In fact, in such pre-trial statement, Mary Ashe, stated in clear and unequivocal language (Court's Exhibit 2).

> "I gave this money in cash to John Donald Walker and asked him to keep the money for me until I decided to invest it. I have no idea where the money now is. Walker has not told me where the money is."

It is to be noted that no mention is made in such pre-trial statement of any representation having been made by defendant to Mary Ashe—that he needed the money for any particular purpose and that she gave him any money for any purpose, except to hold for her.

Mary Ashe further testified, that *after she mortgaged* her warehouse, she received $27,500, which she turned over to defendant. We shall analyze in detail later the particulars of this transaction and the legal inferences to be drawn therefrom.

Mary Ashe testified in substance that defendant represented to her that he sent the *proceeds of the mortgage loan* check to his attorney Morris Meyers in Chicago, to release funds tied up in litigation instituted by his wife (774, 775). This trial testimony is of questionable veracity, for Mary Ashe admitted that, on three occasions in Detroit (1127), she met Morris Meyers through defendant, who certainly would not have arranged such meetings and thereby expose himself to the risk of discovery, if he had, in fact, falsely represented to her that he had forwarded to Meyers the proceeds of the mortgage loan. Moreover, Mary Ashe's testimony as to such representation is further negatived by her pre-trial statement which contains *no mention of any such representation* by defendant.

This representation, like the other alleged representations, is of such importance that, if made, it would have been incorporated in the carefully prepared statement which she signed for the government agents on the day of defendant's arrest.

It was the contention of the defense that Mary Ashe mortgaged her property for honeymoon expenses (1595).

After the defendant received the proceeds of the mortgage loan, he gave Mrs. Ashe a check for $1,000 (912, 640).

On the day after funds were received through the mortgage loan, the Walkers went to St. Louis and then to New

York, evidently continuing their honeymoon (775, 777). Defendant bought drawing room tickets, *with Mary Ashe's knowledge,* with money he had received from cashing the mortgage check (917-18).

Upon their arrival in New York City, they stopped at the Waldorf-Astoria (778, 923-4). Mary Ashe received from defendant a platinum diamond wedding band and a two carat diamond ring (933, 935-8). He also ordered for her an ermine jacket (940-1).

Thereafter, they visited defendant's son in Boston (784-6). Thence they proceeded to Detroit, where the defendant and Mary Ashe met Morris Meyers, defendant's attorney (787). In Detroit, defendant bought a new Cadillac automobile for the sum of $3,200 (788).

They returned to San Antonio, Texas, at the end of March (789), clearly showing that defendant did not leave Texas to escape.

Defendant then left San Antonio, according to Mary Ashe, for a conference with his attorney about income tax matters (793).

Mrs. Ashe testified that defendant returned from that trip, three weeks later, with a negro chauffeur named Jenkins (794). She swore that defendant presented Jenkins to her as the son of old retainers on his place and that Jenkins' father and mother had been in his family for three generations (794-5).

The defense located Jenkins for the second trial as the result of information which had been in the possession of the F. B. I. from the date of defendant's arrest until a few weeks before the second trial (1422-4).

Jenkins testified that he was a senior in Tennessee State College (1328), that his father, the holder of a master's degree, was a high school principal, that both his mother and his sister, whom Mary Ashe later met, held degrees from Hampton Institute (1336-7-8).

Jenkins gave the lie to Mary Ashe. It taxes credulity that defendant would have bragged of "family retainers," when Jenkins could so easily have made a liar of him, by the simple revelation of his own and of his family background—about which true background he did in fact inform Mary Ashe.

Mary Ashe testified that defendant represented his mother and aunt as wealthy (968) and, at her "first" meeting with him on the train, that he represented himself as very busy handling the estate of his mother and aunt (711). This attempt by Mary Ashe to charge defendant with the making of those representations breaks down from admissions elicited from her own lips, because she admitted that defendant took her to visit his mother and his aunt in their modest apartment, and she conceded, on cross examination, that the apartment did not impress her as the home of people of wealth (971).

Mary Ashe also testified that in Baltimore, defendant informed her that he was in income tax difficulties and that he needed additional money to forward to his attorney Meyers (820-2). She gave that as the reason for selling her warehouse on May 28, 1947, thereby raising the funds which, accorded to her, defendant needed (823-4).

We shall later give the details of this transaction (Count 2).

After the warehouse sale, defendant gave Mrs. Ashe $3,500 (of her own money) (1035-6). They then left Houston, Texas, for Baltimore, Maryland (1037-8), and proceeded to Detroit (1044), where they saw defendant's attorney Morris Meyers (1045-7), the very person to whom defendant, according to her, ostensibly sent the remainder of her warehouse fortune, and to whom, she *admitted, she put no inquiry whatsoever concerning the receipt and use by him of her money to save defendant in his litigation with his wife* (mortgage loan of February) *and to save*

him from imprisonment in his income tax difficulties (sale of warehouse in May) (956, 1045-7).

What did she do after she sold her warehouse, allegedly to save the defendant from prison? She and defendant continued on their trip of pleasure. They bought a new Cadillac car in Detroit. The defendant did not leave Texas to escape, for he again returned to Texas (1048). They took off again on a trip through a number of states and visited race tracks (1075-6).

In the East they stopped at the Monmouth Hotel, in Spring Lake, New Jersey, where defendant paid the expenses for Mrs. Ashe's daughter and son-in-law, as well as paying their own bill, about $3,600—a sum typical of their lavish style of living,—(Defendant's Exh. J) (1058-1060). They even occupied a box at the Monmouth Racetrack (1063). In addition, defendant made a substantial payment on a car for Mrs. Ashe's daughter (1060, 1061).

The defendant paid bills at other hotels:— The Belvedere, the Anthony Wayne, the Bedford Springs, and others (Exhs. K, L, M) (1072).

Defendant paid all expenses during their travels and furnished her with whatever cash she requested (982-3, 1001-2) (1087-8) (Exhs. E to M).

The defendant took Mrs. Ashe with him, spent practically all the warehouse money on both himself and her, and remained with her until arrested, although he had practically nothing left.

Furthermore, he did not use the channels of Interstate Commerce to make *his escape from Texas,* because he returned to Texas a number of times after the alleged larcenies.

ARGUMENT

POINT I

The summation of the prosecutor was so prejudicial that it deprived the defendant of a fair trial and requires a reversal of his conviction.

In his summation, the prosecutor made a number of intemperate and prejudicial remarks that require a reversal of the judgment of conviction. The prosecutor's summation and its effect upon the jury should be considered in the light of the fact that the jury returned with its verdict 19 hours after the case was submitted to it and after it twice returned for additional instructions.

At the conclusion of the prosecutor's summation, defense counsel moved for the withdrawal of a juror and a mistrial because of the prejudicial nature of the summation (1710-11). To the denial of the motion an exception was duly taken (1712).

We will enumerate instances of misconduct of the prosecutor during the course of his summation.

At the very outset of his summation, the prosecutor made the following statements:

> "* * * he is a crook and a phoney, that is as plain and as sure as two and two make four, tricky, crafty, and a type of worm" (1646-7).
>
> * * * * *
>
> "The defendant is a type of worm roaming the earth" (1653).

In referring to defendant and his son, the prosecutor had this to say (1667):

> "We don't know whether this *natural son* of this unnatural father despised this man or loved him." (Emphasis ours.)

Funk & Wagnalls New Standard Dictionary of the English Language, at page 1653, in defining the term "a natural child" contains the following:

> "*Natural* - - - 9. Born out of wedlock; illegitimate; as a *natural* child. * * *
> Natural child - - - 2. In modern law, a bastard."

The Century Dictionary (Vol. 6, p. 3941) contains the following definition:

> "Natural (b) by birth merely; not legal; illegimate; bastard, as a *natural* son; a use which dates from the beginning of the seventeenth century."

To the same effect:

> *Webster's New International Dictionary,* 2nd Ed., p. 1630;
> *Wharton's Law Lexicon,* 14th Ed., p. 682;
> *Bouvier's* (Rawle's 3rd Revision), p. 2297;
> *Black's,* 3rd Ed., p. 321;
> *Ballentine's,* 1930, p. 848.

In *Marshall* v. *Wabash R. Co.,* 46 Fed. 269, 273, the Court said:

> "The general rule is that the expression 'natural children' refers, exclusively to children born out of lawful wedlock."

See also:

> *Commissioner of Public Welfare, etc.* v. *Koehler,* 284 N. Y. 260, 264.

The impropriety of the prosecutor's statement reflecting upon the legitimacy of defendant's son and the moral turpitude of defendant is manifest.

The defendant did not take the stand and offered no evidence of good character. His character, therefore, was

not at issue and it was improper for the prosecutor to attack it. Defendant had the right to rely upon the legal presumption that his character was good.

Mullen v. *U. S.*, 106 Fed. 892;
Volkmor v. *U. S.*, 13 F. (2d) 594, 595.

In the case at bar, the trial court did not admonish the prosecutor and the overruling of defense counsel's objections had the effect of giving judicial approval to the unfair summation of the prosecutor.

There was no evidence in the record to the effect that defendant preyed upon mothers and heartbroken women and yet the prosecutor made the following improper statement (1657):

> "* * * He is the type of bird that preys on society in this slimy field, this man who says he can help her, and we know that there are many of them, and he chooses particularly, as far as I am concerned, from the very nature of things, mothers and heartbroken women who will shut up and not report."

At the beginning of his summation, the prosecutor made a manifest appeal to prejudice, when he requested the jury to go outside of the evidence to convict defendant because of any unpleasant experiences that they personally may have suffered at the hands of a thief. He made the following argument (1647):

> "* * * I hope there is somebody on this jury who has been taken in some way, however it be, some time in his or her life, by a phony, and most of us have. If so, you can explain to your brother jurors and sister jurors what we mean by the habiliments and the earmarks of a confidence man."

The prosecutor, in discussing the testimony of defendant's witness, John Logan Jenkins, had this to say (1651, 1694-5, 1651):

> "* * * I don't think I am taking much liberty when I ask you to brand Mr. Jenkins as a perjurer. *His story was a phony from start to finish.*"
>
> "* * * As far as *I am concerned* the colored boy is telling you a lie, and he is a perjurer;"
>
> "He was brought up here to smear Mrs. Ashe. He did not quite get between the sheets with her, but that is about all he didn't dare to do." (Italics ours.)

Thus, the prosecutor improperly attacked the witness Jenkins, who, the record discloses, had a good background, was a senior at Tennessee State College, and is the son of a High School Principal (1328-1336).

It is improper for a prosecutor to label the testimony of a defendant's witness as false.

> *People* v. *Reimann*, 266 App. Div. 505, 42 N. Y. S. (2d) 599.

The prosecutor improperly and repeatedly expressed his own opinion as to defendant's guilt. He made the following statements:

> "If you believe, *as I do* on the evidence in this case that the guilt of this man has been proved incontestably; *if you believe with me* * * *" (1707).
>
> * * * * * *
>
> "And the agents tell us that he said that if ever he was brought to charges on what he did to Mary Ashe, he would have to plead guilty, and let me say to you *that that is apparent to me* and I think it is to you that that is what he should have done long ago" (1692-3). (Emphasis ours.)

The prosecutor wrongfully vouched for the credibility of the agents as follows (1608):

> "* * * but that is the truth, *I say*, that the agents have sworn to." (Emphasis ours.)

Similar remarks have been condemned in *People* v. *O'Regan*, 221 App. Div. 331, 338, 223 N. Y. S. 339; *People* v. *De Martine*, 205 App. Div. 80, 84, 199 N. Y. S. 426; *People* v. *Teiper*, 186 App. Div. 830; *People* v. *Reimann*, 266 App. Div. 505.

To the same effect:

> *Berger* v. *U. S.*, 295 U. S. 78, 88;
> *People* v. *Fielding*, 158 N. Y. 542, 548.

The prosecutor in the case at bar also expressed his personal knowledge as follows (1665):

> "Mrs. Ashe told you that she never saw one of these (Traveler's checks) and I ask you to believe it because *I know* that it is entirely possible for a con-man working with a normally soft and trusting and pliable woman to get away with it." (Italics ours.)

During the course of his summation, the prosecutor improperly had recourse to a document not in evidence. The instrument had been excluded from evidence by a ruling of the Trial Court and yet the prosecutor improperly referred to the document as follows (1659-60):

> "And so Mary Ashe tells us that she met this man on the train, and by the way, while I am on that point, let me refer to the letter. Mr. Sabbatino made love to this letter. That is all he has got out of all the evidence produced in this case in the course of a week's time, this is all he had to work with in his summation on its face an ostensible contradiction, *but you remember that there is another exhibit here, Court's Exhibit*

> *1, which I showed to Mrs. Ashe, seven pages, a second statement which she gave to the F. B. I. agents."* (Italics ours.)

The gravity of the prosecutor's offense, in referring to a document not in evidence, is noted in Wigmore's *Treatise on Evidence,* 3rd Edition, Vol. II, Sec. 2199, at page 565, where it is written:

> "* * * There is a general mental tendency when a corporal object is produced as proving something *to assume on sight of the object, all else that is implied in the case* about it. The sight of it seems to prove all the rest. This tendency, illogical though it be, is temporarily rooted in all persons, even the most intelligent and reflective." (Italics ours.)

That the jury was influenced by, and gave weight to the prosecutor's reference to the excluded statement of Mary Ashe, is evidenced by the fact that the jurors interrupted their deliberations and made the following request (1782):

> "May we please have the first original statement to the F. B. I. by Mrs. Ashe, *also by the second one."* (Italics ours.)

The importance attached to the excluded exhibit by the prosecutor in his summation and the jury's request for the excluded exhibit both demonstrate that the jurors were influenced by the prosecutor's reference to the exhibit and were considering its suggested contents in their deliberations.

The prosecuting attorney's reference in his summation to a document not in evidence, and his vituperative appeals to prejudice, were calculated to preclude a fair and dispassionate trial of the issues herein, and especially in the absence of corrective and cautionary instructions by the court.

> *U. S.* v. *Toscano,* 166 F. (2d) 524, 527;
> *Towbin* v. *U. S.,* 93 F. (2d) 861, 868-9.

At the conclusion of his summation the prosecutor sought to intimidate the jury with this statement (1707-8):

> "* * * I don't believe a jury of twelve people, and I will take any twelve, could fail to find this defendant guilty of the crime he is charged with, because the proof is overwhelming, and if the jury did not so find on this overwhelming evidence in this case, it might well be said by someone that perhaps they were not competent to serve, * * *."

After urging the jury to find defendant guilty, the prosecutor concluded his summation with this improper remark (1709):

> "* * * If I served on the jury in this case, I would get the greatest pleasure out of doing my duty, as I hope you do."

Similar language was condemned in *Lowdon* v. *U. S.*, 149 Fed. 673, 678.

It is, therefore, apparent from an examination of the prosecutor's summation that it abounds with improper and intemperate statements, the effect of which was to deprive defendant of a fair and impassionate consideration of the evidence by the jury.

The prosecutor made the statements complained of without restraint and check by the trial court. Defendant's counsel's motion for the withdrawal of a juror was denied (1710-12) and the trial court did not in its charge to the jury endeavor to erase in any way the prejudice to defendant that resulted from the inflammatory summation of the prosecutor. It cannot be said that the charge of the trial court, in general and formal language, without allusion to the specific and improper remarks of the prosecutor had the effect of neutralizing the harm and prejudice caused thereby.

Each misconduct by the prosecutor, when *separately* considered as an isolated example, may be condoned. It is the *cumulative* effect of the summation, with a crescendo of improprieties, that leads to its condemnation as frustrating the object of any trial—the ascertainment of the truth. Guilt not found by a jury in accordance with the procedure and standards appropriate for criminal trials in the federal courts is abhorrent to our sense of justice, (*Bollenbach* v. *U. S.*, 326 U. S. 607, 614).

Judge Frank, in voting to reverse, condemned the summation of the prosecutor and stated that he did not believe that the errors complained of were "harmless", or that the defendant received the fair trial to which he was entitled (p. 674 of Record). After discussing in detail the harmful effect of each instance complained of, he concluded his dissenting opinion by observing that the Supreme Court has struck a balance different from his Court of Appeals and stating that the Supreme Court has held errors prejudicial which his Court had called "harmless" (p. 680 of Record).

We respectfully submit, therefore, that the trial court erred in denying defendant's counsel's motion for a withdrawal of a juror.

The prejudicial nature of the prosecutor's summation and the fact that the jury reached its verdict 19 hours after the case was submitted to it, require that the judgment of conviction be set aside.

POINT II

The Court's arbitrary rulings, during defense summation, deprived defendant of a fair trial.

The defendant was denied a fair trial wherein his substantial rights were prejudiced because the trial court abused its discretion in curtailing defense summation on a vital issue of fact, concerning an alleged admission of guilt by the petitioner, and arbitrarily invaded the province of the jury in improperly deciding favorably to the government an issue of fact bearing on that point, although the record clearly showed that the Court was in error, which error the Court refused to permit defense counsel to point out, thereby placing defendant and his counsel in a prejudicial light before the jury.

Agents Jones and McMillan both testified at this trial that defendant, when questioned by them, had admitted that he was guilty and that he would plead guilty (1295, 1438).

At the first trial, before Judge Leibel, the agents had not given *any testimony to the effect* that defendant had admitted to them his guilt (1495-6, 1436). Jones also admitted that he was *specifically* asked by Prosecutor Lauritano at the first trial if he had testified to everything defendant had told him and that he testified, at the first trial, that he had given the entire conversation (1437).

McMillan testified, at this trial, that he had disclosed the matter to Prosecutor McAuley, for the first time, a few days before the present trial (1501-2).

Jones stated at this trial that before the first trial he informed Prosecutor Lauritano about defendant's alleged admission but had been told by him not to mention it (1438-9).

Agent McMillan was subjected at this trial to a vigorous cross examination during the course of which the following occurred (1496):

> "Q. Mr. McAuley was one of the prosecutors (at the first trial) wasn't he? A. McAuley was there, I believe.
>
> Q. And Mr. Lauritano? A. That is right."*

Neither on re-direct examination of McMillan, nor at any time during the taking of testimony, did Mr. McAuley challenge the accuracy of the foregoing testimony of his witness McMillan that he, too, McAuley, was one of the prosecutors.

In an effort to minimize the inconsistency between agent Jones' first trial testimony and his testimony at this trial, the prosecutor asked agent Jones for his explanation as to why he had failed to disclose at the first trial defendant's alleged confession of guilt. In this connection, the record discloses the following (1438-9):

> "Q. Have you any explanation why you testified to it under oath in this trial and did not at the prior trial? A. Yes, I have.
>
> Q. State your explanation. A. Mr. Lauritano, who prosecuted the case in the first trial, told me not to mention it.
>
> Q. He specifically instructed you not to mention it? A. Yes, sir.
>
> Q. At the time did he give any reason to you? A. Yes, he did.

---

* Defense counsel put that question to agent McMillan, because he knew, from his study of the record of the first trial, that Mr. McAuley had actively participated in that trial. His brief in the Court below contains the following, unchallenged by the government in its brief: "The record on appeal in this Court from the judgment of conviction in the first trial of the defendant discloses the active participation therein of prosecutor McAuley" (670-673, 678, 684, 1037, 1144, 1316).

Q. What did he say? A. He pointed out that it was an extremely damaging admission and that it would have the effect of making it appear that we were being too severe with the defendant, that we did not want him to have any chance whatever in court."

We submit that the explanation advanced by agent Jones for the apparent inconsistency in his testimony was properly subject to attack by the defense.

In his summation, defendant's counsel argued that agent Jones' testimony to the effect that he had disclosed the matter to prosecutor Lauritano in the first trial was a fabrication. When defense counsel sought to establish this argument by referring to the joint prosecution, at the first trial, of defendant by prosecutors Lauritano and McAuley, his summation was interrupted as follows (1638-40):

"Now, this case before Judge Liebel, as the record shows, and as has been admitted, was prosecuted by Mr. McAuley:

Mr. McAuley: I object to that.

Mr. Sabbatino: —and Mr. Lauritano.

Mr. McAuley: I object to that.

The Court: Objection sustained.

Mr. Sabbatino: Why, the record shows it.

The Court: *The record does not show anything at all.*

Mr. Sabbatino: *I will point it out to you.*

The Court: *You won't point out anything.* You *will finish in five minutes.*

Mr. Sabbatino: May I read from the record?

The Court: No, the record was not introduced in this trial.

Mr. Sabbatino: No, I mean the record in this trial.

The Court: The case is concluded so far as the testimony was concerned, and conclude your summation and do not argue with me.

Mr. Sabbatino: I respectfully except." (Emphasis ours.)

Defense counsel made reference to such joint prosecution in a proper effort to convince the jury that both the alleged confession and agent Jones' statement that he had disclosed the confession to Lauritano at the first trial were fabrications upon the part of the witness Jones.

Defense counsel sought to emphasize the highly implausible character of the testimony of agent Jones as to the alleged confession, for certainly such an important fact would not have been kept a secret from McAuley by Lauritano.

In sustaining the prosecutor's objection, the trial court thwarted defense counsel in making a proper argument upon the evidence in the case. The court, by its ruling, conveyed the impression to the jury that there was no evidence that Mr. McAuley was associated with Mr. Lauritano in the prosecution of defendant at the first trial. The rebuke administered to defense counsel, and the statement of the trial court to the effect that his contention was not sustained by the record, destroyed defense counsel's argument that agents Jones and McMillan were not worthy of belief when they testified that defendant had confessed to them his guilt.

In the case of *United States* v. *Feldman,* 136 F. (2d) 394, 399, the Court, in commenting upon the admissibility of evidence of prior inconsistent statements, had this to say:

> "Prior statements that the partners did not consider themselves to have been defrauded would have been inconsistent with the testimony that 'in the beginning' they cashed Feldman's checks believing them to be good (fol. 2385). Such statements were admissible to discredit their testimony. (Cases cited.) Similarly, evidence as to their conduct with respect to the insurance investigation and claim was competent, for 'a failure to assert a fact, when it would

have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact.' "

Thus the curtailment of the summation on an important point, and the Court's erroneous statement of fact concerning a contested issue, as well as the Court's refusal to permit counsel to prove, by reference to the record of this trial, that the Court was in error, prejudiced the defendant in a substantial right to receive a fair trial.

POINT III

The search and seizure of defendant's effects and papers was unauthorized and illegal, and the use of information derived therefrom constitute a clear breach of the Fourth and Fifth Amendments to the Federal Constitution. Defendant's objections and exceptions to the court's rulings sustaining the seizure and allowing the evidential use of information obtained therefrom present prejudicial and reversible error.

In advance of the trial, the defendant moved to suppress certain evidence obtained by government agents as a result of an illegal search of his luggage.

The District Court overruled defendant's motion to suppress, on two grounds: (1) that the motion was not timely (355); and (2) that defendant had given his consent to the search and seizure (354, 368).

As to the first reason assigned for the denial, we submit that the trial court was in error. The motion to suppress, having been made before the commencement of the trial and the taking of any evidence, was timely.

Samson v. *U. S.*, 26 F. (2d) 769-770;
Amos v. *U. S.*, 255 U. S. 313, 314;
Nardone v. *U. S.*, 308 U. S. 338, 341, 342.

Furthermore, the Court of Appeals evidently gave that reason no weight, for it makes no reference to it as a basis for sustaining the validity of the search.

As to the second ground, the language attributed to the defendant, under the circumstances surrounding the obtaining of the alleged consent, did not sustain the trial court's finding,—that the defendant had consented to the search and seizure.

It is significant, in this connection, that the Court of Appeals, in stating its reasons for sustaining the seizure, was silent on the question of alleged consent. It sustained the search and seizure on the sole ground that the defendant "had no right to object to the search of premises not occupied by him nor to the seizure of property not within his possession" (670).

It is fundamental that objection may be made under the Fourth Amendment by one who owns property illegally seized as well as by one who owns or possesses premises illegally searched: *Jeffers* v. *United States,* 187 Fed. (2d) 498; certiorari granted, 71 S. Ct. 570.

The Court of Appeals, District of Columbia Circuit, declared in the *Jeffers* case, *supra,* at page 501:

> "We believe the correct rule to be that one who seasonably objects to the use in evidence against him of property he *owns* which has been seized as the fruit of an unlawful search or otherwise in violation of the Fourth Amendment is entitled to its exclusion *though the premises searched were not his.* He is a 'victim' of * * * and 'aggrieved' by * * * the violation of the Fourth Amendment. To deny him standing to object would be inconsistent with the purpose of the exclusionary rule to make the amendment effective; for it condemns unreasonable seizures as well as unreasonable searches and applies to 'effects' as well as to 'houses'." (Emphasis ours.)

We submit that the view expressed in the *Jeffers* case, *supra,* represents a sounder concept of the protection which the Founding Fathers intended to guarantee by the adoption of the Fourth Amendment, than does the narrower view, in the case at bar, of the Court of Appeals of the Second Circuit.

The facts of the search and seizure herein are as follows: Defendant was arrested on Friday, August 29, 1947, in connection with the Grehan charges—charges other than the one involved in the case at bar (50). He was lodged in jail in the town of Cumberland, Maryland (133). Agent Jones had no knowledge, then, as to the facts leading to defendant's arrest (219).

Defendant's luggage was in the hotel room of defendant and his wife Mary Ashe Walker.

On the following day, Saturday, August 30th, agent Jones opened, with keys obtained from Mary Ashe, all of the baggage in the hotel room, except the Gladstone bag.

The defendant used this bag exclusively for his private papers. In it were personal papers that revealed him as a polygamist. That the bag contained only personal papers of the defendant was attested to, under oath, by Mrs. Ashe, who, from the date of her marriage to the defendant until the day of the search, had never seen the inside of the bag (71). The key to the Gladstone bag was missing, although agent Jones knew that a key existed, because it had been in possession of the defendant when he was arrested on the day before the search (189). It was this bag that Jones was unsuccessful in unlocking with the keys in his possession (152).

The search consisted of a general rummaging through the private papers of defendant for anything the agents could find (122). After searching other baggage of the defendant, and after unsuccessfully seeking to unlock the Gladstone bag, the agent then went to the jail, where de-

fendant was in custody, to obtain the key from him (192). It is clear from the testimony that, up to this point, the agent had unlocked all of defendant's luggage, with the exception of the Gladstone bag, without first obtaining the consent of defendant.

The agent testified that, upon reaching the jail, he asked defendant for the key (193). The jailer had taken Walker's keys and locked them up. The agent examined them and he did not find the key. He then asked defendant what happened to the key. Defendant is alleged to have said that his wife had it (193). The agent told him that they had tried all of the keys that appeared to fit and that none of them would open the Gladstone bag. He then asked defendant if he had any objection to the breaking of the lock and defendant is alleged to have answered: *"If you want to open the bag, go ahead and break the lock, I don't care"* or *"I have no objection"* (193-4).

Since the agent did not recall defendant's exact language, we are justified in adopting the statement more favorable to defendant, to wit: "If you want to open the bag, go ahead and break the lock, I don't care."

No search warrant had been obtained. In fact, although there was ample time, no application was at any time made for a search warrant, although defendant was arraigned on the afternoon of his arrest (139-140), before a Commissioner who lived in the town and was available (137), and the search did not take place until the day following the arrest.

The agent did not ask for or obtain the consent of defendant in writing, although paper was available (194), and although the agent, to give his search the color of legality had taken the precaution of obtaining, two days after the search, permission in writing from Mary Ashe, despite the fact that none of her effects was seized (155, 173).

On the question of whether defendant's language constituted voluntary consent, these factors must be kept in mind:

1) Defendant was lodged in jail.

2) In the Gladstone bag in the hotel room were personal papers that would reveal him as a polygamist to Mrs. Ashe, the woman whom he had married and with whom he was living as man and wife.

3) Defendant had locked that bag the day before and taken the key.

The language attributed to defendant under the circumstances outlined above did not constitute a true consent, it is submitted, but was compelled by the circumstances in which defendant found himself. If defendant had actually wanted to consent, he would have surrendered the key which was in his possession the day before.

In *U. S.* v. *Davis,* 151 F. (2d) 140, at page 142, the Court wrote as follows:

> "The Judge found that Davis' consent was 'voluntarily' given and for that reason denied the motion to suppress the evidence. * * * Davis must have known, under arrest as he was, that the officers were not likely to stand very long upon ceremony, but in one way or another, would enter the office."

It has been held that consent cannot be deemed voluntary, unless it clearly appears that it was freely and intelligently given, not expressly or impliedly coerced,

Ray v. *United States,* 84 Fed. (2d) 654.

Even if we accept agent Jones' testimony, we must conclude that there was no such consent in the case at bar as would amount to a waiver by defendant of his constitu-

tional rights, but, on the contrary, his action must be attributed to a peaceful submission. Mere submission in an orderly way to the actions of the Federal agents is not a waiver.

Johnson v. *U. S.*, 333 U. S. 10, 13;
United States v. *Slusser*, 270 Fed. 818.

The agents' failure to obtain or to apply for a search warrant was unreasonable under the circumstances heretofore set forth.

Agnello v. *United States*, 269 U. S. 20, 32.

In *Milburne* v. *United States*, 77 F. 2d 310, 311, this Court said:

> "* * * The search and seizure without first procuring a warrant may well have been unreasonable, in view of the abundant opportunity the officers had to obtain one."

When an officer without a warrant and without consent enters the premises of another and searches and seizes effects found in the course of such search, he violates the Fourth Amendment unless the search and seizure are incident to a valid arrest (*United States* v. *Rabinowitz*, 339 U. S. 56; *Johnson* v. *U. S.*, 333 U. S. 10, 15.

In the instant case, there was no arrest to which the search and seizure were incident nor was there any emergency. The search and seizure were not incident to the arrest but occurred one day afterwards, while the defendant was in jail.

The search of defendant's luggage, being exploratory and general, was therefore, unreasonable.

United States v. *Lefkowitz*, 285 U. S. 452, 467.

The court in the Lefkowitz case explicitly stated that "an arrest may not be used as a pretext to search for evidence." A general search to obtain whatever evidence it might bring to light, is clearly a violation of the rights of personal security and of private property.

Agent Jones admitted in an affidavit that, in a search of defendant's Gladstone bag, the agents found an envelope containing the name and address of Mrs. J. D. Walker, and that Mrs. J. D. Walker was identified, in the birthday card found in the envelope, as Clara Walker, wife of defendant (64).

The envelope bearing the name and address of Clara Duerr Walker had no bearing on the Grehan charge, for which defendant was being then arrested. It was in no way used by defendant to commit the alleged crime for which he was then arrested. This court has held that papers which are not used to commit or to carry on the crime for which the defendant is charged are not subject to seizure.

United States v. *Poller,* 43 F. (2d) 911.

The articles seized were the private correspondence of the defendant and were not objects utilized in perpetrating the crime for which arrest had been made. Such private correspondence may not be taken into custody: *United States* v. *Rabinowitz, supra; United States* v. *Lefkowitz,* 285 U. S. 452, 464; *Gouled* v. *United States,* 255 U. S. 298.

The information which the agents admittedly obtained from the Gladstone bag constituted a lead which enabled the government to discover that the defendant's marriage to Sally Grehan was bigamous.

If it had not been discovered, by the illegel search and seizure, that defendant was married to Clara Duerr Walker, then his marriage to Sally Grehan would have

been deemed valid and not bigamous, and, in such case, defendant's amorous telegrams would have been subject to an objection that they were privileged as private and personal communications between husband and wife. The evidence secured by the illegal search thwarted a legal objection to the introduction of the very damaging telegrams.

The prosecutor, himself, acknowledged that, without the Sally Grehan evidence, it was doubtful what the jury's verdict would be (1698-9). Yet, a substantial part of her evidence was made legaly available to the prosecution by the illegal search and seizure.

Evidence is inadmissible, not only when obtained during an illegal search, but also when derived from information gained in an illegal search.

United States v. *Krulewitch,* 167 F. (2d) 943.

The agent and the prosecutor conceded that their information as to Clara Duerr Walker was derived from a search of the defendant's luggage (108, 231, 1158-9, 1444-7, 1474-6).

It is submitted hat the trial court erred in ruling that the search and seizure of defendant's luggage did not violate the constitutional protection of the Fourth Amendment and for the foregoing reason the judgment of conviction should be set aside.

POINT IV

The refusal of the trial court to direct the government to produce, for inspection by defense counsel or for inspection by the court itself, an investigation report concerning a search and seizure, the legality of which the defense challenged, was in violation of the Fourth, Fifth, and Sixth Amendments to the Federal Constitution, requiring the reversal of the defendant's conviction.

Under Point III, we discussed the circumstances surrounding the search and seizure of defendant's gladstone bag, the contents of which revealed that the defendant had living a wife—Clara Duerr Walker—unknown to the government prior to the search, proof of whose existence was made by the government at this trial.

During his cross examination, agent Jones, whose veracity was being challenged, admitted preparing an investigative report (169). The trial record then discloses the following unsuccessful defense effort to secure submission of that report to scrutiny by the defense or by the trial court itself (169-171):

> "Mr. Sabbatino: I ask for the production of it.
>
> Mr. McAuley (shaking head): I decline. I am not authorized to give out any official FBI reports, your Honor.
>
> Mr. Sabbatino: Well, we are trying this case. The secrecy ends when we are in a court of law. They can't suppress or withhold evidence. I think your Honor should direct the production of that report, at least so that your Honor should examine it.
>
> Mr. McAuley: What he is asking for is a mere enumeration of this list in an official FBI report. That is all he is asking for.
>
> Mr. Sabbatino: No, we are doing more than that. We are testing the Fourth and Fifth Amendments of

the Federal Constitution. We ask for the protection provided by that Constitution.

The Court: Motion denied.

Mr. Sabbatino: I respectfully except. I ask your Honor to have the U. S. Attorney show it to you so that you may inspect the report.

The Court: Motion denied.

Mr. Sabbatino: I want to test the credibility of the witness.

The Court: Motion denied.

Mr. Sabbatino: I respectfully except."

Agent Jones' report should have been produced and should have been examined by the trial court.

U. S. v. *Andolschek,* 142 F. 2d 503, 6;
U. S. v. *Krulewitch,* 145 F. 2d 76, 78-9;
U. S. v. *Beekman,* 155 F. 2d 580, 584;
U. S. v. *Grayson,* 166 F. 2d 863, 870;
U. S. v. *Coplon,* 185 F. 2d 629, 638;
Peo. v. *Walsh,* 262 N. Y. 140, 149-50;
Peo. v. *Schainuck,* 286 N. Y. 161, 165-6.

In the court below, on this point, Chase, J., in the case at bar, wrote as follows:

"We are unable to conclude that the denial of this motion was seriously prejudicial to the appellant because of the possibility that something in the report might have been inconsistent with the agent's testimony * * *"

We submit that in so holding, the Court of Appeals erred and that the former Chief Judge Learned Hand, of the same Court, appraised the error herein complained of more accurately, when he wrote, in the *Andolschek* case, *supra,* at page 506:

> "We cannot of course know, as the record stands, how prejudicial the exclusion may have been, but that uncertainty alone requires a new trial; for it does not affirmatively appear that the error was insubstantial within the meaning of 28 U. S. C. A. § 391."

The philosophy behind the rule which required the trial court to examine Jones' report and, if it contained contradictions, to make it available to the defense for further cross examination, was well stated by Cooley, Ch. J., in *Peo.* v. *Davis* (52 Mich. 569, 573):

> "The state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. * * * if there shall be in the possession of any of its (the State's) officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it."

As has been previously stated, the veracity of agent Jones was under attack. The truth of his testimony—that defendant had consented to the search and seizure—was at issue. An examination of Jones' report might have revealed facts that would have induced the Court to hold the search and seizure illegal. Such holding would have resulted in the exclusion, as pointed out in Point II, of much damaging evidence regarding defendant's relationship with Saly Grehan, for his marriage to Clara Duerr Walker, the knowledge and proof of which made the Grehan marriage bigamous, was discovered by the illegal search (77).

An inspection of agent Jones' report might have disclosed, too, facts impeaching the veracity of his trial testimony about defendant's alleged oral confession of guilt.

We therefore respectfully ask this Court to hold that the true administration of federal criminal justice requires

that a trial court, when asked by the defense, must examine a prior statement of a witness called by the government for inconsistencies, when such statement is in the possession of the government and is available in court, especially where, as here, no reason is given by the prosecutor for the refusal to produce it, except his lack of authority.

POINT V

The Judgment of Conviction should be reversed for:—(a) there is a failure of proof that defendant transported "money" of the value of $5,000 or more, under either count of the indictment; and (b) there is a failure of proof that defendant transported stolen property.

A

There is no proof as to the transportation of money of the value of $5,000 or more under either count.

There is no proof that defendant transported *money* of the value of $5,000.00 or more into the City of New York under either count of the indictment.

Both counts of the indictment contain peculiar phraseology—that the defendant transported "the *sum* of approximately $26,000" (Count One), or, "the *sum* of approximately $23,500" (Count Two).

If the phrase "the sum of" is interpreted to mean that defendant transported *money* of the value of $5,000.00 or more, such interpretation excludes from its scope any charge that defendant transported *securities,* for the word "money" and the word "securities" are defined differently by the statute here involved.

Section 414 of Title 18 of the U. S. Code* defines the word *money* as the "legal tender of the United States or of any foreign country, or any counterfeit thereof".

* Now Section 2311, Title 18, U. S. C. A.

Included in the statutory definition of the term securities in Section 414 are the words "check" and "traveler's check".

Since the only possible interpretation of the word "sum" herein is that it refers to "money", and since "money" by its statutory definition is limited to legal tender and does not include "checks or traveler's checks", *defendant could not be legally convicted of transporting stolen money by proof that he transported stolen checks or traveler's checks.*

Since the indictment does not refer to "securities", which embraces in its statutory definition the words *checks* and *traveler's checks,* such checks were not provable under the indictment in the case at bar.

In *Gesell* v. *United States,* 1 F. (2d) 283, it was held that one uttering a forged assignment of a genuine obligation of the United States could not be convicted of uttering a forged obligation or security. The Court of Appeals there held that the defendant therein was entitled to a directed verdict because of a fatal variance between the indictment and the proof.

So in the case at bar. The Government sought to prove the indictment by evidence of the transportation by defendant of "securities". It is respectfully submitted that this constituted a variance between the indictment, alleging the transportation of "the sum", to wit, "money", and the evidence that defendant transported "securities".

Consequently, in order to establish defendant's guilt under the indictment charging him with the transportation of *money,* it was incumbent upon the Government to prove that the defendant actually transported *money* of the value of $5,000.00 or more. That, it failed to do.

As to the First Count:

In the Bill of Particulars, the Government alleges the transportation by defendant of the sum of $6,000.00 *in cash* under the first count of the indictment (81).

While the evidence discloses that the defendant did *receive* $6,000.00 in cash in Houston, Texas, when he negotiated the mortgage loan check to cashier's checks, traveler's checks and cash, there is *no proof that defendant transported the $6,000.00 cash,* or any part thereof, to New York City.

The Government's evidence fails to exclude the possibility of the disposal by defendant of the whole or part of the $6,000.00 in cash in Houston, Texas, in St. Louis, or en route, before his arrival in New York City. No burden rested upon the defendant to offer evidence that he did dispose of the whole or a part of the said $6,000.00 in cash in Houston or St. Louis, and that he did not transport into New York City $5,000.00 or more.

The mere fact that defendant visited New York does not prove that he had in his possession any of the *money* which he had obtained in Houston, Texas.

Where circumstantial evidence is relied upon to sustain a conviction, the inferences that may be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence.

Strickland v. *U. S.,* 155 F. (2d) 167.

In the case at bar, the Government's evidence does not exclude as a matter of law the possibility that defendant disposed of, elsewhere than in this jurisdiction, at least a part of the allegedly stolen property and, consequently, the evidence is not inconsistent with defendant's innocence.

The Government's failure actually to establish that at least $5,000.00 of the $6,000.00 in cash, which defendant obtained in Houston, Texas, was transported by him to New York City, is fatal. Consequently, the judgment of conviction under the first count of the indictment must be set aside.

As to the Second Count:

The above reasoning as to the first count of the indictment is also applicable to the second count.

It was incumbent upon the Government to prove the transportation by the defendant of *money* of the value of $5,000 or more under the second count of the indictment.

As has been demonstrated above, the Government cannot establish the transportation of money by the proof of the transportation of *securities,* to wit, checks and traveler's checks.

In its Bill of Particulars, the Government alleged the transportation by the defendant of the sum of $4,860, in cash, under the second count of the indictment (83). On its face, therefore, the second count of the indictment, even as amplified by the Bill of Particulars, is insufficient in that it charges the transportation by defendant of less than $5,000 in *money.*

Moreover, there is a total failure of proof that the whole or any part of the said sum of $4,860.00 in cash was transported to New York City. The evidence does not exclude the reasonable possibility of the disposal by defendant of the whole or part of the cash before his arrival in New York City (*Bryan* v. *U. S.,* 175 F. (2d) 223).

Assuming that under the indictment it was permissible for the Government to offer proof as to the transportation by the defendant of "*securities*" as well as "*money*", it is respectfully submitted that there is *no* proof of the transportation of any *money* or *securities,* or both, of the value of $5,000.00 or more under the second count of the indictment and, theretofore, the judgment of conviction upon that count should be set aside.

If the evidence is analyzed, it will disclose that, after the alleged theft by the defendant of Mary Ashe's property,

he left with her for New York City and, on the way, they stopped off at Baltimore (1037-9).

Mary Ashe testified that at no time after the sale of her warehouse did she see any traveler's checks or American Express money orders in the possession of the defendant (*870-1*). Corroborative of this fact is that none of the traveler's checks was cashed in New York (Govt. Ex. 27B).

That the defendant did not have any of the securities in his possession in New York City is supported by the Jenkins' testimony which reveals that, in Houston, Texas, he returned to the hotel to pick up defendant's coat and papers, after the Walkers boarded the train for New York.

Jenkins testified that, among the documents contained in the defendant's coat, were traveler's checks of large denomination (1367). Corroborative of this fact is the *telegram* which Jenkins sent from Houston, Texas, to the Walkers, delivered en route, advising them that he had secured the defendant's coat and papers (Def's. Ex. T). Jenkins did not rejoin the Walkers until their arrival in Detroit, after their departure from New York (1365-6).

It is significant that the government did not recall Mrs. Ashe to contradict Jenkins' testimony that defendant left his coat and papers, including the traveler's checks, in a hotel suite at Houston, Texas, and that the property was delivered to defendant in Detroit after he left New York (1371-2).

It is apparent, therefore, that there is a failure of proof under the second count, of any transportation into New York City by the defendant of any of the securities.

Therefore, if the term "the sum of", as set forth in the indictment, is interpreted to mean a sum of *money*—which is the only interpretation possible in order to give the indictment sufficiency under the statute—we respectfully submit that defendant's conviction was improper and must be set aside for: (1) There is no proof that the defendant

transported *money* of the value of $5,000 or more under either count of the indictment; and (2) The Second count of the indictment is patently insufficient by reason of the fact that the Bill of Particulars itself states that defendant transported less than $5,000, to wit, $4,860, in cash.

Moreover, the judgment of conviction under the second count of the indictment must be set aside for, assuming it was permissible for the Government to offer evidence as to the transportation of securities as well as money, there is a failure of proof that defendant did transport money or securities, or both, of the value of $5,000 or more.

Furthermore, the government prosecutor may not rewrite the Grand Jury indictment herein through a Bill of Particulars and prove the transportation of traveler's checks when the indictment calls for proof of the transportation of stolen money

Jarl v. *United States,* 19 F. (2d) 891, 894;
White v. *United States,* 67 F. (2d) 71, 78;
Barron, Federal Practice and Procedure, Rules Ed., Vol. 4, p. 31.

B

There is a failure of proof that defendant transported stolen property.

The government contends that defendant fraudulently obtained from Mary Ashe in Houston, Texas, a check in the sum of $27,242.15, representing a mortgage loan, and a check in the sum of $23,500.00, representing the proceeds from the sale of the warehouse. The government also contends that the two checks were obtained by defendant from Mary Ashe on his alleged false representations that he needed the money for certain purposes.

The trial evidence discloses that, after securing the two warehouse checks from Mary Ashe, defendant went with

her to the bank and negotiated them, receiving in return traveler's checks, cashier's checks payable to the Railway Express, and cash (653-6). The cashier's checks were then negotiated at the office of the Railway Express in Houston, and defendant there purchased additional traveler's checks and an unlimited check. Defendant and Mary Ashe then left Houston, Texas, and visited several states, including the State of New York.

It is, therefore, established by the government's own evidence that *defendant did not transport* from Houston, Texas, to New York City, *the two warehouse checks* which he had allegedly secured from Mary Ashe by fraud.

The government, however, proceeds on the theory that where stolen checks are used to purchase other securities or are converted to cash, and such property so acquired is subsequently transported across state lines, such transportation is illegal and comes within the Federal prohibition.

The evidence discloses that the cashier's checks, traveler's checks, and cash, secured by defendant from the bank, at no time was the property of Mary Ashe. The cashier's checks and traveler's checks were issued *directly* in the name of defendant, and the cash was paid over to him *directly* by the bank (680-7). Prior to defendant securing possession of the traveler's checks, cashier's checks, and cash, title thereto was in the bank.

Since Mary Ashe at no time had title to the cashier's checks, traveler's checks and cash, it cannot be contended that the checks and cash were stolen from her.

Moreover, there is no evidence that any of the cashier's checks or traveler's checks secured from the Second National Bank were transported or cashed in New York. The proof as to such transportation relates exclusively to other traveler's checks and an unlimited check subsequently purchased by the defendant from the American Express Company, in Houston, for which the company was com-

pensated with the cashier's checks which defendant had secured from the bank. Neither the cashier's checks, which defendant used for the purchase of the traveler's checks from the Express Company, nor the traveler's checks and unlimited check so purchased (Gov't's Ex. 10, 6A-7A) could possibly be construed as stolen or taken by fraud.

Since the government cannot contend that defendant stole the traveler's checks from the bank or Express Company, and since defendant could not have stolen that property from Mary Ashe, in view of the fact that she never had title thereto, or possession thereof, defendant could not legally be convicted of unlawfully transporting the traveler's checks in interstate commerce.

We respectfully submit that the end cannot be made to justify the means in this case. There can be no justification for convicting defendant for transporting the traveler's checks and unlimited check merely because they are the fruit, *twice removed,* of defendant's alleged larceny from Mary Ashe of the two warehouse checks.

The statute in the case at bar does not include the transportation of property to which stolen funds have been converted. The statute does not make it a crime to transport property which has been purchased with stolen funds.

The principle enunciated in *Fasulo* v. *United States,* 272 U. S. 620, 629, is applicable here. The Supreme Court wrote:

> "The words of the act suggest no intention to include the obtaining of money by threats. There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute."

In *United States* v. *Resnick,* 299 U. S. 207, 209, the Supreme Court stated:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used."

The statute in the case at bar does not include within its definition of the crime the transportation of property purchased with stolen funds. Defendant's conviction upon evidence of the transportation by him of securities purchased with the proceeds of the allegedly stolen warehouse checks did not come within the scope or language of the statute and was, therefore, improper.

The statute sets forth in exact terms the property, transportation of which is prohibited from interstate commerce; it states that the property must have been "theretofore stolen, fraudulently converted, or taken feloniously by fraud with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted or taken." It is respectfully submitted that the securities offered in proof in the case at bar (Exhs. 20, 25 and 26) *were not theretofore stolen* and are not contemplated by the wording or meaning of the statute.

The government may urge that a thief should not be permitted to avoid the Stolen Property Act by changing the form of the stolen goods. We submit that that argument should be addressed to Congress, and not to the courts. Furthermore, such argument ignores the fact that the thief is subject to prosecution in the state where the alleged larceny was committed. *The Federal government has no right to assume jurisdiction not conferred by the statute.*

While *Kann* v. *United States,* 323 U. S. 88, 93-94, does not involve the Stolen Property Act, the reasoning in that case is applicable here. The Court wrote as follows:

> "* * * The check delivered to the five defendants by the building contractor in payment for timber they claimed to own was cashed by them at a local bank in Elkton, Maryland. By cashing it they received the moneys it was intended they should receive under the scheme. The Elkton Bank became the owner of the check. The same is true of the bonus check delivered

to defendant Willis and deposited and credited to his account. The banks which cashed or credited the checks, being holders in due course, were entitled to collect from the drawee bank in each case and the drawer had no defense to payment. The scheme in each case had reached fruition. * * *

* * * The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud leaving all other cases to be dealt with by appropriate state law."

The larceny of goods, and the transportation of stolen property in interstate commerce, are distinct crimes. *The defendant should not be convicted of transporting stolen property unless the specific property that has been stolen is actually transported by him.* If it is urged that the conversion of stolen property into other forms of property results in the branding of such other property as stolen, then it would follow that a suit of clothes purchased with stolen funds would thereby become stolen property and the wearing of such suit of clothes across state lines would constitute the transportation in interstate commerce of stolen property. *We submit that such interpretation was not intended by the enactment of the Stolen Property Act.*

The defendant, in transporting, if he did, the securities here concerned, from Houston, Texas, to New York City, did not use the channels of interstate commerce in violation of the statute as intended by Congress and as interpreted by the Supreme Court of the United States in *United States* v. *Sheridan,* 329 U. S. 379, 384. In that case, in discussing the National Stolen Property Act, the Supreme Court wrote:

"* * * Congress had in mind preventing further frauds or the completion of frauds partially executed.

> But it also contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, *but who utilize the channels of interstate commerce to make a successful get away and thus make the state's detecting and punitive processes impotent.* This was indeed one of the most effective ways of preventing further frauds as well as irrevocable completion of partially executed ones." (Italics ours.)

Assuming defendant did secure the two warehouse checks obtained from Mary Ashe by misrepresentation, he did not escape across the state lines with the checks. The checks were negotiated and other property was obtained, and, with the proceeds of the checks, still other securities were purchased. The securities actually transported were twice removed from the allegedly stolen checks.

The record of this case incontestably proves defendant could not possibly have left Texas for the "purpose of escape to avoid prosecution." Within sixteen days after his departure from Houston, to New York, on February 15, 1947, he voluntarily returned to Texas with Mary Ashe, who was his constant companion. After their departure, following the May 29, 1947, transaction, they returned to Texas after an absence of only eight days. They lived at the same address appearing on defendant's personally signed order for the purchase of the traveler's checks (1049-50, Exh. 7A). An inspection of the expenditure of the checks discloses *in both transactions* that, upon returning to Texas, various amounts ranging up to $900.00 were cashed at the *very same bank* testified to by Mary Ashe as being her personal bank (771-772) and in which she deposited the cashier's checks she took for her personal account, on each occasion, from the proceeds of the warehouse checks cashed by defendant at the Second National Bank in Houston, to wit, $1,000.00 on February 14,

and $3,500.00 on May 28 (Exhs. 16-17). Hence, it is clear, in the face of such irrefutable proof, that it cannot be reasonably inferred that defendant left Texas to avoid prosecution or for any unlawful purpose. Upon its facts this case falls outside of the purpose of the National Property Stolen Act as interpreted in the *Sheridan* case, *supra.*

To convict the defendant of one crime because of his alleged guilt of another crime is inconsistent with the fundamental principles of our jurisprudence. Defendant's conviction should not stand, when based on securities obviously not stolen, the transportation of which is not within the statute, and for which defendant was not indicted.

Since the evidence establishes that defendant did not transport to New York City the two checks allegedly stolen in Texas, it is respectfully submitted that the defendant's conviction must be set aside.

In conclusion it is submitted that the judgment of conviction should be reversed for there is a failure of proof that (a) defendant transported money of the value of $5,000 or more under either count of the indictment and (b) defendant transported stolen property.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

PETER L. F. SABBATINO.

Dated, this 4th day of September, 1951.